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Amalan Tepat Sdn Bhd v Panflex Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()–20 OF 2010(J)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ZULKEFLI AND RAUS SHARIF FCJJ
21 JUNE 2011

Civil Procedure — Judgment and orders — Judgment in default of defence — Main relief in impugned judgment was declaratory relief — Whether default declaratory judgment should be supported by evidence of factual matrix to enable judge to exercise his discretion to grant or refuse declaratory relief — Whether rule of practice should be followed in present case — Whether impugned judgment could be severed to exclude declaratory relief

Panflex Sdn Bhd ('the respondent') had commenced an action in the High Court against Gymtech Development Sdn Bhd ('Gymtech') as the first defendant and Amalan Tepat Sdn Bhd ('the appellant') as the second defendant. In this action the respondent had prayed, inter alia, for a declaration that the supplementary agreement that it had entered into with the appellant and Gymtech had been validly cancelled and terminated, for the refund of the purchase price or as an alternative special loss and specific damages, interest and costs. The appellant failed to file its defence within the time prescribed and filed an application for an extension of time to file the defence. In the meantime the respondent had filed an application to enter judgment in default of defence. Both applications came up for hearing on the same date. The court dismissed the appellant's application for an extension of time to file its defence but allowed the respondent to enter judgment in default of defence. The appellant then proceeded to file an application to set aside the judgment but this application was dismissed by the High Court on the grounds that the appellant had not provided a reasonable explanation as to why there was a delay of more than two years before it applied to set aside the judgment; and that the doctrine of res judicata applied. Dissatisfied the appellant appealed to the Court of Appeal but the Court of Appeal upheld the decision of the High Court and dismissed the appeal. This was the appellant's application for leave to appeal against that decision. The appellant submitted that since the main relief sought by the respondent in this case was declaratory relief, default judgment should not be allowed unless it was supported by evidence which the court had taken into consideration before exercising its discretion to grant the declaratory relief sought. The respondent maintained that the appellant's application to set aside the default judgment was made long after the 30 days provided for under the

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Rules of the High Court 1980. The respondent also submitted that the default judgment could not be severed to exclude the declaratory aspect of it.

Held, allowing the appeal with no order as to costs:

(1) In the present case there was no dispute that the main relief in the impugned judgment was the declaration that the supplementary agreement entered into between the respondent, Gymtech and the appellant had been validly cancelled and terminated by the respondent. It was also clear that the impugned judgment was in fact a judgment in default of defence. As declaration was the main prayer of the respondent it is a rule of practice that before such relief is granted there must be some evidential basis to do so. However, there was nothing to indicate that discretion was exercised by the court when granting the declaratory relief as found in the impugned statement. Hence it was found that the impugned judgment being declaratory in substance had not met the entrenched rule of practice applicable for the granting of declaratory relief and on this ground alone the appeal should be allowed (see paras 13 & 17–19).

(2) The sum which the appellant was required to pay under the impugned judgment was in fact a consequential order. As such, if the declaratory relief in the impugned judgment was set aside then it had no basis to stand on. In the circumstances, the suggestion that the impugned judgment could be severed so as to exclude the declaratory relief could not be acceded to (see paras 20–21).

(3) There was no injustice caused to the respondent since the case was ordered to go for full trial (see para 23).

[Bahasa Malaysia summary

Panflex Sdn Bhd ('responden') telah memulakan tindakan di Mahkamah Tinggi terhadap Gymtech Development Sdn Bhd ('Gymtech') sebagai defendan pertama dan Amalan Tepat Sdn Bhd ('perayu') sebagai defendan kedua. Dalam tindakan ini responden telah memohon, antara lain, untuk pengisytiharan bahawa perjanjian tambahan yang dimasukinya bersama perayu dan Gymtech telah secara sah dibatalkan dan ditamatkan, untuk bayaran balik harga pembelian atau sebagai alternatif kerugian khas dan ganti rugi spesifik, faedah dan kos. Perayu gagal untuk memfailkan pembelaannya dalam masa yang ditetapkan dan memfailkan permohonan untuk lanjutan masa untuk memfailkan pembelaannya. Sementara itu responden telah memfailkan permohonan untuk memasukkan penghakiman ingkar pembelaan. Kedua-dua permohonan didengar untuk pendengaran pada tarikh yang sama. Mahkamah menolak permohonan perayu untuk lanjutan masa untuk memfailkan pembelaannya tetapi membenarkan responden untuk memasukkan penghakiman ingkar pembelaan. Perayu kemudian meneruskan

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untuk memfailkan permohonan untuk mengetepikan penghakiman tetapi permohonan ini ditolak oleh Mahkamah Tinggi atas alasan-alasan bahawa perayu tidak memberikan penjelasan yang munasabah mengapa terdapat kelewatan lebih dari dua tahun sebelum ia memohon mengetepikan penghakiman; dan bahawa doktrin judicata beraplikasi. Tidak berpuas hati, perayu merayu ke Mahkamah Rayuan tetapi Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan tersebut. Ini adalah permohonan perayu untuk kebenaran merayu terhadap keputusan tersebut. Perayu berhujah bahawa memandangkan relief utama yang dipohon oleh responden dalam kes ini adalah relief perisytiharan, penghakiman ingkar tidak patut dibenarkan kecuali ia disokong oleh keterangan yang mana mahkamah telah mengambilkira sebelum menjalankan budi bicaranya untuk membenarkan relief pengisytiharan yang dipohon. Responden mengekalkan bahawa permohonan perayu untuk mengetepikan penghakiman ingkar telah dibuat selepas sahaja 30 hari yang diperuntukkan di bawah Kaedah-Kaedah Mahkamah Tinggi 1980. Responden juga berhujah bahawa penghakiman ingkar tidak boleh diputuskan untuk mengecualikan aspek pengisytiharannya.

Diputuskan, membenarkan rayuan tanpa perintah untuk kos:

(1) Dalam kes ini tidak terdapat pertikaian bahawa relief utama dalam penghakiman yang dipersoalkan adalah pengisytiharan bahawa perjanjian tambahan yang dimasuki di antara responden, Gymtech dan perayu telah secara salah dibatalkan dan ditamatkan oleh responden. Ia adalah jelas bahawa penghakiman yang dipersoalkan tersebut sebenarnya penghakiman ingkar pembelaan. Memandangkan pengisytiharan adalah permohonan utama responden ia adalah amalan peraturan bahawa sebelum relief sedemikian dibenarkan mesti terdapat asas jelas untuk berbuat sedemikian. Walau bagaimanapun, tidak terdapat apa-apa untuk menunjukkan bahawa budi bicara dilaksanakan oleh mahkamah seperti yang didapati di dalam penyata yang dipersoalkan tersebut. Maka ia didapati bahawa penghakiman yang dipersoalkan tersebut sebagai pengisytiharan pada amnya tidak memenuhi peraturan amalan yang telah berakar umbi yang beraplikasi untuk memberikan relief pengisytiharan tersebut dan atas alasan ini sahaja rayuan tersebut patut dibenarkan (lihat perenggan 13 & 17–19).

(2) Jumlah yang mana perayu dikehendaki membayar di bawah penghakiman yang dipersoalkan tersebut sebenarnya perintah penting. Oleh itu, jika relief pengisytiharan di dalam penghakiman yang dipersoalkan tersebut diketepikan oleh itu ia tidak ada asas untuk berdiri. Dalam keadaan ini, cadangan bahawa penghakiman yang dipersoalkan tersebut boleh diputuskan untuk mengecualikan relief pengisytiharan tidak boleh dipersetujui (lihat perenggan 20–21).

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A (3) Tidak terdapat ketidakadilan yang diakibatkan kepada responden memandangkan kes telah diarahkan untuk perbicaraan penuh (lihat perenggan 23).]

Notes

B For cases on judgment in default of defence, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4619–4623.

Cases referred to

Gan Boon Kyee v Yap Hong Sin & Anor [1997] 2 MLJ 598, CA (folld)

C *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821, Ch D (refd)

Harpal Singh (Ibrahim Hashim, Hassan Ibrahim, Haryinder Singh and Ivan Loo with him) (Hassan Ibrahim & Co) for the appelant.

KK Wong (Shanmugaraj a/l Chelliah, Low Eu Thuan and Karen Lee with him) (Ngae Shan Kalai & Co) for the respondent.

D

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

E

[1] Leave to appeal was given by this court on 4 November 2010 on one question, namely:

> Whether an application for a declaratory judgment in default of defence pursuant to O 19 r 7(1) of the Rules of the High Court 1980 must be supported by evidence of the factual matrix to enable a judge to exercise his discretion in granting or refusing the declaratory relief prayed for?

F

G **[2]** We heard the appeal on 19 April 2011. After hearing the submissions of learned counsel for the parties we answered the question in the positive and allowed the appeal.

Accordingly we set aside the default judgment obtained in the High Court on 29 April 2010 ('the impugned judgment') and which was upheld by the Court of Appeal on 6 October 2010. We also ordered that the case should go for full trial. No order as to costs was made and that the deposit paid for the appeal was ordered to be refunded to the appellant.

H

[3] We now give our reasons for our decision.

I

[4] Briefly the respondent commenced an action at the Muar High Court, Johor, against Gymtech Development Sdn Bhd as the first defendant and the appellant as the second defendant (referred to as the appellant in this judgment).

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[5] In the action as against the appellant, the respondent prayed for the following, inter alia:

(a) a declaration that the supplementary agreement entered between the respondent, the first defendant and the appellant has been validly cancelled and terminated by the respondent;

(b) the refund of the purchase price amounting to RM2,913,160 for the 14 units of condominium;

(c) as an alternative, special loss and specific damages to be accounted and assessed based on the contra costs/set off in the sum of RM2,913,160; and

(d) interest at the rate of 8%pa from the date of the supplementary agreement that is 11 August 2000 or such date as deems by the court.

[6] The solicitors for the appellant failed to file the defence within the time prescribed and only filed it on 10 October 2006.

[7] Subsequently the respondent filed an application (encl 10) while the appellant filed an application (encl 14) to extend time to file the defence. Both applications came up for hearing on 24 August 2007. Enclosure 14 was heard first and dismissed. Upon the dismissal of encl 14 the application of the respondent that is encl 10 was allowed with judgment in default of defence entered in favour of the respondent.

[8] Several notices of motion were filed with the Court of Appeal in relation to the encl 10 and encl 14. However, none of them were allowed by the Court of Appeal. There were also stay applications made by the appellant but none of them succeeded.

[9] The appellant then proceeded to file an application (encl 51) to set aside the judgment in default of defence. It was dismissed by the Muar High Court on 29 April 2010. The reasons were that the doctrine of res judicata applied and delay for more than two years without any reasonable explanation given for such delay. The merit of the defence was not considered.

[10] In dismissing the appeal against the refusal of encl 51 the Court of Appeal also held that there was no reasonable explanation given for the delay in making the application.

[11] Before us one of the critical point raised by learned counsel for the appellant was that the main prayer sought for by the respondent was for a

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declaratory relief. As such default judgment should not be allowed unless supported by evidence and for the court to consider before it exercises its discretion.

[12] For the respondent it was contended inter alia that the application to set aside the default judgment was made long after the 30 days period provided for under the RHC. Further it was submitted that there was no defence to the claim and the doctrine of res judicata applied. Learned counsel went on to say that in any event the default judgment could be severed to exclude the declaratory aspect of it.

[13] With respect we are unable to agree with the submission of learned counsel for the respondent. As declaration was the main prayer of the respondent it is a rule of practice that before such relief is granted there must be evidential basis to do so. The courts are very slow in granting declaratory prayer without any evidence and argument advanced.

[14] In *Gan Boon Kyee v Yap Hong Sin & Anor* [1997] 2 MLJ 598 the Court of Appeal said this at p 601:

> I have read the judgment of the learned judicial commissioner with great care, bearing in mind that this is not the case of an ordinary judgment in default but one of declaratory relief. As observed by Zamir & Woolf on *The Declaratory Judgment*, (2nd Ed) at p 264:
>
> … courts will generally be reluctant to grant a declaration as part of a default judgment in the absence of any evidence and argument. Before the court grants a declaration, it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief (per Gopal Sri Ram JCA (as he then was)).

[15] We are inclined to agree with the dicta in the abovementioned case.

[16] In fact it is a rule of practice that 'the court does not make declarations of right either on admissions or in default of pleading' and the rule is quite entrenched as observed in the case of *Patten v Burke Publishing Co Ltd* [1991] 2 All ER 821. This is what Millett J said:

> It is not the normal practice of this division to make a declaration when giving judgment by consent or without a trial as in the case of a judgment in default of defence or of notice of intention to defend the proceedings. That is a practice of very long standing. It was confirmed in *Wallersteiner v Moir* [1974] 3 All ER 217; [1974] 1 WLR 991. In that case the claim, which was contained in a counterclaim, sought a declaration that the plaintiff had been guilty of fraud, misfeasance and breach of trust. The judge granted the declaration in default of the defence and the Court of Appeal struck it out. *Buckley LJ said (* [1974] 3 All ER 217 at p 251; [1974] 1 WLR 991 at p 1029):

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> It has always been my experience, and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation.
>
> Scarman LJ gave judgment to the same effect but in somewhat different terms. He said ([1974] 3 All ER 217 at p 253, [1974] 1 WLR 991 at p 1030):
>
> When what is sought is a declaration, there is the risk of irremediable injustice; the court has spoken and words cannot be recalled, even though later they may be negatived: 'nescit vox missa reverti' (Horace Ars Poetica I 390). The power of the court to give declaratory relief on a default of pleading, of course, exists, but, for the reason crystallised by Horace in those four words of his, should be exercised only in cases in which to deny it would be to impose injustice on the claimant. This approach leads me to the conclusion that the declaratory relief contained in the minute of judgment annexed to the order of Geoffrey Lane J should be disallowed at this stage.

There was of course a strong objection to the inclusion of the declaration sought in that case. Even after trial it is not the normal practice of the court to make a declaration that the defendant had been guilty of fraud or negligence. Justice can be done to the plaintiff by awarding him damages. If he wishes to parade the basis upon which damages have been awarded to him, he has a judgment which he can produce. The judgment will contain the findings of fraud or negligence upon the basis of which the damages have been awarded, and that should be sufficient for the plaintiff's purpose. But in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts been investigated. *Quite apart from this, however, it is clear from Wallersteiner v Moir that the rule is a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without such a declaration.* (Emphasis added.)

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[17] Reverting to the present case there is no dispute that the main relief in the impugned judgment is the declaration that the supplementary agreement entered between the respondent, the first defendant and the appellant has been validly cancelled and terminated by the respondent. It is also on record that the impugned judgment was granted upon the dismissal of the application (encl 14) for extension of time to file the defence by the appellant (see judgment of the Muar High Court dated 29 April 2010). In other words the impugned judgment is in fact a judgment in default of defence.

[18] Meanwhile, there is nothing to indicate that discretion was exercised by the court when granting the declaratory relief as found in the impugned judgment.

[19] We therefore find that the impugned judgment being declaratory in substance has not met the entrenched rule of practice applicable as exposited above for the granting of declaratory relief. Accordingly on this ground alone that we should allow this appeal.

[20] However, there is another issue which is not directly within the ambit of the question posed. Nevertheless we should briefly address it. It is the sum which the appellant is required to pay under the impugned judgment. We are of the view that it is in fact a consequential order. As such if the declaratory relief in the impugned judgment is set aside then it has no basis to stand on.

[21] Further, although the prayer refers to the refund of purchase price for 14 units of condominium, in fact it has to do with the construction works rendered by the respondent for the first defendant. In this case there was no proper assessment of the actual sum the respondent should be paid. Thus the sum ordered to be paid has not been justified. We therefore decline to accede to the suggestion that the impugned judgment can be severed so as to exclude the declaratory relief.

[22] We are conscious of the alleged indolence on the part of the appellant in the conduct of this case. However, it is not a sufficient reason to ignore 'a practice of very long standing' on the grant of declaratory relief for judgment in default. Thus, despite the appellant succeeding in this appeal we made no order as to costs against the respondent.

[23] Accordingly for the foregoing reasons we allowed the appeal and made the other orders as we did. We find no reason to deal with the other points

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raised by learned counsel for the parties. Further, we do not think there is any injustice caused to the respondent since we have ordered for the case to go for full trial.

Appeal allowed with no order as to costs.

Reported by Kohila Nesan